

STATE OF WISCONSIN

CIRCUIT COURT
BRANCH

WAUKESHA COUNTY

JEROME J. GOTTFRIED,

ORDER OF DISMISSAL

Petitioner,

CASE NO: 95CV587
WIS NO: 30607

v.

WISCONSIN DEPARTMENT OF
INDUSTRY, LABOR & HUMAN RELATIONS,

Respondent

The Respondent, Department of Industry, Labor Human Relations moved to dismiss the petition for judicial review herein, on the grounds that it was served and filed beyond the strict deadlines established pursuant to Ch. 227, Stats. The petitioner moved to quash the motion and sought discovery and hearing on the issue of notice of appeal rights.

This court issued a Memorandum Decision of September 27, 1995 granting the Respondent's motion to Dismiss the Petition for Review for reasons stated in the Memorandum Decision.

NOW, THEREFORE, on the basis of the pleadings and papers filed herein, the briefs and argument of counsel, the court, consistent with its Memorandum Decision, hereby dismisses this action for lack of subject matter jurisdiction.

Dated this 18th day of October, 1995.

BY THE COURT:

ROBERT G. MAWDSLEY

Circuit Judge

STATE OF WISCONSIN

CIRCUIT COURT

WAUKESHA COUNTY

BRANCH 11

JEROME J. GOTTFRIED,

Petitioner,

DECISION

CASE NO. #9SCV 587

vs.

WISCONSIN DEPARTMENT OF
INDUSTRY, LABOR & HUMAN RELATIONS,

Respondent.

Wisconsin Department of Industry, Labor & Human Relations, respondent, seeks dismissal Of the Petition for judicial review on the basis of timeliness; petitioner, Jerome Gottfried, seeks to quash the motion and seeks discovery and hearing on the issue or notice of appeal rights. The court concludes Petitioner's request for a hearing is denied and respondent's motion to dismiss for failure to file within the thirty (30) day calendar limit is granted.

The petition in paragraph seven states, "Since DILHR never mailed the decision to Gottfried, the statutory 30 day period for filing an appeal has never begun to run. " Paragraph eight, "Although Gottfried did not receive the aforementioned decision, Gottfried's consultants, Cooper Environmental & Engineering Resources, Inc., had received a copy of the decision and, therefore, prepared, on Gottfried's behalf, a request for hearing in compliance with the Provisions of ILHR 47.53. Wis. Adm. Code." The petitioner's appeal was filed thirty-two days after the Department's decision. The appeal was not signed by the Petitioner, Jerome Gottfried.

Countering the allegations of the petition is an affidavit from Brett C. Wieber. The affidavit indicates on January 27, 1995 he obtained a check in the amount of \$126,454.77 from the department fiscal services staff and that same day he deposited in first class mail documents which included a single page sheet titled 'Right to Appeal this Agency Action'. The mailing was addressed to Jerome Gottfried, Firststar Bank, Cooper Environmental & Engineering and WDNR. The check for

payment of the claim was mailed to Firststar Bank in Sheboygan and the check was made 'out jointly to Jerome Gottfried and Firststar Bank. Brett Wieber also indicated he personally stamped the date of mailing in red ink on the copies of the breakdown of PECFA costs sent to Petitioner Gottfried, Cooper Engineering and Firststar Bank. Brett Wieber's affidavit is dated April 18, 1995.

The petitioner:

1. seeks relief under §225.57 (1),
2. requests the court ignore the Wieber affidavit and
3. respectfully requests the opportunity to conduct the deposition of the affiant, Mr, Wieber, to make inquires into the conclusory testimony set forth in the Affidavit."

The question for the court at this stage of the proceedings is whether petitioner has demonstrated that evidence concerning notice to petitioner. Jerome J. Gottfried should be taken.

Judicial review proceedings are created entirely by statute. The circuit court sits as appeals court rather than initial forum or trier of fact. The right to appeal under Chapter 227 is dependent on strict compliance with its provisions. Cudahy vs. Department of Revenue, 66 Wis. 2d 253 (1974). The petition for review must be served and filed within thirty days of service of the agency decision under §227.48. The timely filing goes to subject matter jurisdiction. The court finds the issue of timeliness of appeal is not a procedural irregularity which occurred before the agency. The court also considers the Wieber affidavit an integral part of the return under §227.55. Therefore, the court does not consider this notice issue to be something that occurred before the agency. Indeed, none of the cases quoted have fact situations similar to the one at hand.

In the forum of administrative review, where case law holds that procedures under Chapters 800 through 809 are generally inapplicable, there is no basis for the court to allow deposition of Wieber. From an administrative law perspective, the court " finds petitioner's request inappropriate because Mr. Wieber's affidavit is entitled a presumption of regularity. Nothing in this record militates against that presumption. Indeed, the presumption is bolstered by the receipt of the notice by Cooper Environmental and the mailing of a large check to Firststar. The court sees no need to put an agency

employee through a deposition on this issue. The Petitioner offers nothing else by way of the petitioner's circumstances to justify a hearing. Everyone else got proper notice except the Petitioner, and the petitioner offers nothing but an inquiry of Mr. Wieber to test the presumptively valid affidavit.

The court dismisses this appeal for lack of subject matter jurisdiction.

Counsel for the respondent is to draft and file an order in conformity with this decision.

Dated this 27th of September, 1995.

ROBERT G. Mawdsley
Circuit Judge

Attorney Stanley Riffle
Assistant Attorney General Steven Wickland